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In the Supreme Court of the United States

KAY STALEY,

Cross-Petitioner,

v.

HARRIS COUNTY, TEXAS,

Cross-Respondent.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR CROSS-PETITIONER

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REPLY BRIEF FOR CROSS-PETITIONER

The en banc court's mootness ruling entailed substantial legal error. But Staley suffered no prejudice because the retention of the district-court decision ensures that the behavior she challenged will not recur. If, however, this Court were to reverse the vacatur ruling, clearing the path for a legally indistinguishable redisplay, Staley's interests would be severely prejudiced: If the County were to erect a legally identical redisplay, Staley's only recourse would be to relaunch from scratch a lawsuit that has already consumed four years of personal (not to mention judicial) resources.

In contrast, the only consequence that the County identifies as flowing from retention of the district-court decision is that the decision "sets a precedent which forms part of the jurisprudential backdrop against which courts and parties must evaluate even arguably analogous cases in the future." Cross-Opp. 10. But the district-court decision is not binding on any court, even the one that issued it — a point that the County ignores. And the Fifth Circuit has instructed that the decision's effect is limited to precluding "relitigation of the identical issues by the same parties under the same circumstances" (Pet. App. 14a), and that a new display arising in a different context would merit a new legal analysis (*id.* at 6a), thereby providing the County with ample cover from any overreaching.

The retention of the district-court decision was, under those circumstances, eminently reasonable. But if this Court reopens that ruling, the en banc court's mootness ruling presents a classic instance in which a conditional grant of certiorari is warranted. *See generally Snepp v. United States*, 444 U.S. 507 (1980) (granting conditional cross-petition where cross-petitioner's interests were adequately protected by relief awarded below, but undoing that relief would cause prejudice unless relief rejected by court of appeals were adopted in its place).

I. The En Banc Court's Mootness Ruling Was Erroneous.

A. The Court Below Confused Ripeness with Mootness.

The question in this case is not whether a challenge to a *future* display is ripe; it is whether Staley's challenge to the *old* display is moot. *Cf.* Pet. App. 6a; Cross-Opp. 9-10. Ripeness relates to whether a plaintiff would have standing to bring a new lawsuit; mootness relates to whether a pre-existing lawsuit can continue. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 191-92 (2000). While the "prospect that a defendant will engage in (or resume) harmful conduct may be too speculative" to establish standing, that does not mean it is "too speculative to overcome mootness." *Id.* at 190.

Accordingly, this Court held in *Laidlaw* that the closure of the defendant's plant did not necessarily moot the case because the plant could be reopened, though a new action brought after the closure would have been unripe. *Id.* at 190-94. Similarly, this Court held in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), that a plaintiff could not initiate a challenge to a policy to which he was not imminently subject (*id.* at 105-10), though a temporary cessation of the policy would not have mooted a case that had been justiciable at its inception (*id.* at 101).

Hence, that the details of a future display are unknown, and that Establishment Clause inquiries are fact-intensive, does not moot Staley's challenge to the old display (the details of which *are* fully known). Rather, the mootness inquiry turns on whether the display has been irrevocably removed. *See Laidlaw*, 528 U.S. at 193.

B. The County Has Not Met Its Burden to Demonstrate That the Monument Has Been Irrevocably Removed.

For a case to be mooted by cessation of the challenged conduct, the party asserting mootness must demonstrate both that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation" (*County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)), and that it is

"*absolutely clear* that the . . . behavior could not reasonably be expected to recur" (*Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 66 (1987) (internal quotation marks and citation omitted)).

Here, the County has pledged to redisplay the monument. *See* Pet. App. 13a. Although it has claimed that "the redesign of the courthouse building and plaza will make it a physical impossibility to return the Monument to its past location" (County's En Banc Br. 8; *see also* Cross-Opp. 3 ("it is beyond doubt that the Monument will never again be located in the place that prompted Staley's suit")), it submitted no affidavits, renovation plans, or anything else to substantiate that claim. *Cf. City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000) (referring to affidavit submitted with suggestion of mootness).[1] A party's "own statement[s,] . . . . standing alone, cannot suffice to satisfy the heavy burden of persuasion" to demonstrate mootness. *See United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968).

And even if the County had shown that the monument could not be returned to the precise spot on which it formerly stood, the County has not demonstrated that there is anything to deter the monument's placement a few feet away or in any other location substantially similar to the old one. A defendant cannot

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[1] The County's statements regarding its past actions are as untested as its statements about its future intentions. *See* Cross-Opp. 3 (baldly asserting that "it is clear that the County [did not] remove[] the Monument to moot the litigation"). The en banc court was unpersuaded. *See* Pet. App. 10a (noting that "the timing of the removal may be open to question"); *id.* at 14a ("when we raised the issue [of the renovation], Harris County proceeded on its own volition to remove the monument only days before oral argument, and now it seeks advantage of its conduct"). Although the en banc court said that "the bottom-line cause of the removal was related to the ongoing renovations" (*id.* at 10a), it did not say that the renovation was the *sole* reason for the removal. If it had, it would have been overreaching: The County's "motivation is . . . a factual question" unamenable to decision without a hearing. *See Hunt v. Cromartie*, 526 U.S. 541, 549-52 (1999); *cf. Laidlaw*, 528 U.S. at 193 (holding that likelihood of recurrence was a factual matter warranting evidentiary development).

moot a case by ceasing challenged activity, only to undertake new action that differs "only in some insignificant respect." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993). Indeed, even if the County had disavowed an intention to pursue a legally indistinguishable redisplay, "[t]he possibility that [it] may change its mind in the future is sufficient to preclude a finding of mootness." *See United States v. Generix Drug Corp.*, 460 U.S. 453, 457 n.6 (1983).[2]

The County's only response is to assert that the voluntary-cessation doctrine simply does not apply. Cross-Opp. 2-5. It argues that mootness resulted from "changed circumstances," not from cessation of conduct. *Id.* at 5. But mootness *always* rests on changed circumstances. Here, the form that the change took was the monument's removal. *See* Pet. App. 6a (the monument is now "[o]ut of sight in some warehouse [so it] no longer raises the potential Establishment Clause violations that offended Staley"). If this case is moot, it is because, and only because, "the challenged conduct [has] cease[d]." *City of Erie*, 529 U.S. at 287.[3]

In *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (cited at Cross-Opp. 3), by contrast, the voluntary-cessation doctrine was not triggered because the challenged conduct had not ceased. Rather, the case became moot because the plaintiff's impending

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[2] The County argues that "even Staley concedes it is impossible to know . . . whether any redisplay will run afoul of this Court's context-sensitive Establishment Clause cases." Cross-Opp. 3. But when it is impossible to know whether challenged conduct will recur, a case is decidedly not moot. *See* cases cited at Cross-Pet. 7-8.

[3] The County argues that the monument's removal does not constitute "judicial relief." Reply 2. But a mootness ruling does not rest on a plaintiff's having obtained *judicial* relief; it obviates the need for such relief. Mootness arises in this case, if at all, because Staley has obtained the result that she sought (removal of the display), albeit without a final appellate pronouncement. *Cf. Lane v. Williams*, 455 U.S. 624, 633 (1982) (finding case moot because, "[t]hrough the mere passage of time, respondents ha[d] obtained all the relief that they sought").

graduation ensured that he would never again be subjected to that conduct. *See* 416 U.S. at 318. Here, mootness arises from the display's removal, not from a change in Staley's status.

The County contends that the voluntary-cessation doctrine applies only when action is taken "for the purpose of mooting the litigation." Cross-Opp 3, 4-5. In fact, the doctrine applies whenever the defendant has ceased the challenged activity, irrespective of *why* it did so. *See, e.g.*, *Concentrated Phosphate*, 393 U.S. at 202-03 (applying doctrine to determine whether antitrust action was mooted by developments that made it uneconomical for defendant to continue challenged activity, even though developments were not attributable to defendant); *Laidlaw*, 528 U.S. at 193-94 (applying doctrine to assess whether environmental organizations' challenge to plant's emissions became moot when plant was closed, without any indication that closure was due to litigation); *Nat'l Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 349, 352 (D.C. Cir. 1997) ("voluntary cessation analysis governs our mootness inquiry" even though "legislature may [have] act[ed] out of reasons totally independent of the pending lawsuit"); *Khodara Envtl., Inc. ex rel. Eagle Envtl. L.P. v. Beckman*, 237 F.3d 186, 194 (3d Cir. 2001) (Alito, J.).

The County also claims that the "conduct at issue" is its effort to maintain the constitutionality of the Monument . . . in the face of Staley's . . . challenge" — something it has not voluntarily forgone. Cross-Opp. 4. But the conduct at issue under the voluntary-cessation doctrine is the "*challenged* conduct" (*City of Erie*, 529 U.S. at 287), not the party's *defense* of that conduct. And the County exaggerates when it claims that it has been involuntarily foreclosed from persisting with its defense. *See* Cross-Opp. 4; *accord* Reply 6 (pointing to unfairness in retaining decision that County "cannot appeal"). The case undoubtedly would have remained justiciable if the County had simply asserted that it wants to reserve the option to erect the monument outside the building's main entrance in a location akin to the old one. So why has it forsworn that

option? Because it *wants* to avoid adjudication; not because it lacks the power to bring such adjudication about. And if it has truly forsworn a legally identical redisplay, why does the County care whether the district-court judgment stands?

II. Mootness and Vacatur Are Distinct but Related Inquiries.

The County argues that "this Court is not in the habit of reaching out for fact-bound issues that provide the necessary predicate for the question that *is* certworthy." Cross-Opp. 2. But nor is the Court in the habit of considering legal issues in a vacuum. In this case, mootness is not merely the predicate to vacatur; the two rulings draw on an overlapping universe of facts. *See* Cross-Pet. 5-10.

The County denies any overlap, arguing that vacatur and mootness are "entirely separate inquiries" (Cross-Opp. 6), with mootness hinging on "whether or not the plaintiff retain[s] a personal interest in the outcome" (*id.* at 7 n.3). But the County concedes that the intent behind the mooting action and the likelihood of recurrence are central to the mootness analysis. *Id.* And it does not dispute that those considerations can likewise factor into the vacatur analysis. *See* Cross-Opp. 7.

To be sure, courts most often address the other considerations that Staley cited — the litigants' candor and the length of the litigation (*see* Cross-Pet. 5-6) — in conjunction with vacatur rather than mootness, but it is by no means error to do otherwise, because those issues likewise bear on the plaintiff's continuing stake in the case. If a party has not been forthcoming with the courts, it is eminently reasonable to discredit the party's promise not to re-offend. *See City of Erie*, 529 U.S. at 288 (noting that Court's "appraisal of Pap's affidavit [was] influenced" by Pap's delay in bringing mooting action to Court's attention). And if a defendant has "litigated up to this Court and back down again" (*Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000)), one can only assume that it has a strong attachment to the challenged behavior, and that

any abandonment of the practice may be short-lived (*see Gray v. Sanders*, 372 U.S. 368, 376 (1963) ("voluntary abandonment of a practice does not relieve a court of adjudicating its legality, particularly where the practice is deeply rooted and long standing")). *See also Hall v. Bd. of Sch. Comm'rs*, 656 F.2d 999, 1000 (5th Cir. 1981) (declining to find case moot where "[d]efendants disputed the constitutionality of the practice up to the day of trial, when defense counsel for the first time indicated they had no intention of reviving the [challenged religious] devotionals").

The County inadvertently concedes the factual overlap that it contests. In discussing mootness, it argues (incorrectly, *see supra*, at 5) that the voluntary-cessation doctrine applies only when the defendant acts "for the purpose of mooting the litigation and with a view toward resuming *wrongful conduct*." Cross-Opp. 3. But that is virtually indistinguishable from the dividing line that the County advocates for *vacatur*: "There is substantial confusion among the courts of appeals [about whether to vacate when the appellant's] actions were not taken to influence the litigation." Pet. 10; *see also* Pet. 11-12.[4]

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[4] The County retreats from its earlier position when it denies the inconsistency between its mootness and vacatur arguments. In its Petition, the County argued that the district court's ruling "will impede . . . redisplay [of] the Monument." Pet. 16. Now, however, the Count asserts only that the decision "sets a precedent which forms part of the jurisprudential backdrop" for Establishment Clause cases generally. Cross-Opp. 10. But the new argument fares no better: District-court decisions lack any controlling effect (*see* Opp. 26), and the en banc court has explicitly cabined the decision's reach (*see supra*, at 1).

The County also denies any tension between its attorney-fee and mootness arguments, asserting that Staley's argument to the contrary "shows a fundamental misapprehension of the mootness doctrine." *See* Cross-Opp. 9 n.5. But the error is the County's, in relying on an exceedingly vague formulation of the events giving rise to mootness. *See id.* (referring to "changes in the circumstances"). If this case is moot, it is because the challenged behavior has ceased. Cessation may not necessarily make the plaintiff a prevailing party under 42 U.S.C. § 1988 (though Staley satisfies

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To say that mootness and vacatur can rest on overlapping factual predicates does not conflate the two inquiries. *Cf.* Cross-Opp. 7-8. Compensatory damages and injunctive relief usually rest on the same unlawful conduct, but they remain distinct legal issues. Indeed, the very existence of the judicial-estoppel doctrine (*see* Opp. 24 n.14) makes clear that a single consideration can underlie two or more issues that arise successively in a case.

What is more, if the County were correct that the length of the litigation and the litigants' candor cannot inform the mootness analysis (*see* Cross-Opp. 7 n.3), that limitation would provide an important reason to reject the County's proposed vacatur standard, which likewise turns a blind eye to those considerations. For if those aspects of a case cannot enter into the mootness analysis *or* the vacatur inquiry, then when can they be considered? Legal rules that disregard the equities will yield inequitable results. Indeed, under the County's view of the law, a court could not distinguish between a litigant that manipulates the court's jurisdiction by withholding information, and one that displays uncompromising candor. Nor could a court distinguish between a case that has been ongoing for a decade, with favorable rulings accruing to the plaintiff throughout, and one that was filed yesterday. Surely, a one-size-fits-all rule is more likely to produce inequitable results than is a rule that takes the equities into account.

The County complains that an equitable rule "has very little to recommend it when, as this case demonstrates, it produces results so demonstrably at odds with equity." Reply 6. But

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[4] (...continued)
the statutory definition (*see* Opp. 26-30)), but there is no denying that this case is moot, if at all, because Staley has obtained the result she sought.

One other point regarding attorneys' fees warrants mention: Contrary to the County's contention (*see* Reply 9-10), it is well established that collateral issues, *including attorneys' fees*, can be decided after an action has been dismissed for lack of jurisdiction. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395-96 (1990).

where is the inequity in asking the County to keep its promise not to re-offend — a promise on which the en banc court relied in depriving Staley of an opportunity to cement her victory?

To make matters worse, the County's proposed vacatur standard would disallow courts to distinguish between a party's unilateral acts, on the one hand, and earthquakes or other acts of God, on the other. *See* Reply 2. To date, the parties' respective fault for the mootness has been the *central* factor in the vacatur analysis (*see U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25-29 (1994)), with *Bancorp* and *Karcher* straightforwardedly defining 'happenstance' to entail "'circumstances unattributable to any of the parties'" (*Bancorp*, 513 U.S. at 23 (quoting *Karcher v. May*, 484 U.S. 72, 83(1987))).[5] When mootness has resulted from developments that are attributable to the party asserting mootness, this Court has generally denied vacatur even when the developments were unrelated to the litigation.[6] Accordingly, the County's proposed

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[5] *Center for Biological Diversity v. Lohn*, 483 F.3d 984 (9th Cir. 2007) (cited at Reply 5), reaffirmed the Ninth Circuit's allegiance to the principle that happenstance vacatur does not pertain when "the appellant's unilateral acts prevent appellate review of an adverse judgment." *Id.* at 990. Even most legislative-amendment cases do not label the mootness "happenstance." Rather, they treat the mooting event as voluntary action by the loser below, but they conclude that equitable considerations nonetheless favor vacatur. *Khodara*, 237 F.3d at 194-95; *NBPA*, 108 F.3d at 351-54. Some legislative-amendment cases have rested on happenstance, but that was because the amendment was deemed unattributable to the *litigant*, not merely because it was unrelated to the *litigation*. *See Rendell v. Rumsfeld*, 484 F.3d 236, 243 (3d Cir. 2007); *see also Bancorp*, 513 U.S. at 25 & n.3 (noting that happenstance vacatur would have been granted in *Munsingwear* only because mooting action "[could]not fairly be attributed" to litigant).

[6] In *Karcher*, the decision to capitulate resulted not from litigation-related developments but from an unrelated turnover in the defendant-legislature's make-up. 484 U.S. at 76. And *Laidlaw* includes no indication that the defendant-polluter chose to close its plant because of the litigation. 528 U.S. at 179, 193-94. Yet this Court nonetheless applied a presumption against vacatur in both cases. The County has not offered any rationale for why this case should be subject not merely to the opposite presumption, but to an

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standard — which makes vacatur turn exclusively on whether the mooting event was related or unrelated to the litigation — would mark a significant departure from the Court's longstanding practice. *See* Opp. 9, 14.

If the litigants' responsibility for the mooting action could no longer inform the vacatur analysis, then it would merit treatment in assessing mootness — lest it not be considered at all. Addressing it as part of the mootness analysis is perfectly compatible with Article III — because the unilateral power to cease offending behavior presumptively encompasses the power to re-offend (*cf. Generix Drug Corp.*, 460 U.S. at 457 n.6 (fact that litigant can simply change its mind precludes case from being moot)) — though doing so has been unnecessary because the parties' respective roles in the mooting event has traditionally figured prominently in the vacatur determination.

The en banc court reasonably considered the parties' respective responsibilities for the mootness, together with the length of the litigation and the County's forthcomingness, as part of its vacatur analysis, rather than as part of the mootness determination. *Compare* Pet. App. 6a *with* Pet. App. 10a-14a. So reconsidering the vacatur ruling, without also reopening the mootness ruling, would risk disregarding these considerations altogether — a result that would be fundamentally unfair to Staley as the prevailing party, and that would encourage manipulation of the courts' jurisdiction.

CONCLUSION

If this Court grants review of the vacatur ruling, it should also review the inextricably intertwined question of mootness.

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[9] (...continued)
automatic rule at that.

Respectfully submitted.

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